APPENDIX A

COURT OF APPEALS MEMORANDUM OPINION

United States Court of Appeals,

Ninth Circuit.

SOGECABLE, SA; Canalsatelite Digital, S.L., Plaintiffs-Appellants,

v.

NDS GROUP PLC; NDS Americas, Inc., Defendants-Appellees.

No. 04-56990.

Argued and Submitted Nov. 14, 2006.

Filed Dec. 13, 2006.

Michael T. Purleski, Esq., Squire, Sanders & Dempsey, LLP, Los Angeles, CA, David S. Elkins, Esq., Squire, Sanders & Dempsey L.L.P., Palo Alto, CA, for Plaintiffs-Appellants.

Scott T. Wilsdon, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA, Patrick Lynch, Esq., O'Melveny & Myers, LLP, Los Angeles, CA, Darin W. Snyder, Esq., O'Melveny & Myers, LLP, San Francisco, CA, for Defendants-Appellees.

Appeal from the United States District Court for the Central District of California; David O. Carter, District Judge, Presiding. D.C. No. CV-03- 01174-DOC.

Before B. FLETCHER, FERNANDEZ, and GRABER, Circuit Judges.

MEMORANDUM*

Plaintiffs Sogecable, S.A., and CanalSatélite Digital, S.L., which are Spanish satellite television companies, filed suit against Defendants NDS Group PLC and NDS Americas, Inc., alleging damages for Defendants' hacking into and publishing Plaintiffs' "smart card" data encryption code. Plaintiffs sued under the Digital Millenium Copyright Act, 17 U.S.C. § 1201; the Communications Act of 1934, 47 U.S.C. § 605(e)(4); and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. Plaintiffs also sued under California law for intentional interference with contract and for tortious interference with prospective economic advantage. *See Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 589-90 (Cal. 1990) (discussing the elements of both torts). The district court dismissed Plaintiffs' complaint, holding that (1) the non-RICO claims were time-barred, and (2) Plaintiffs did not allege facts sufficient to establish RICO enterprises. We reverse and remand for further proceedings.

We review de novo dismissals under Rule 12(b)(6), "accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs." *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). "A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

1. At argument, Defendants' counsel conceded that, under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reason-

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

able diligence could not know, *who* caused the harm that is the subject of the complaint. Here, taking the pleadings as true, Plaintiffs exercised due diligence before March 12, 2002, the date on which they first learned Defendants' identities.[1]

Plaintiffs, who did not have expertise in "smart card" technology, relied on the inventor and licensor of the technology to investigate the technological clues of Defendants' identities while Plaintiffs worked with Spanish law enforcement to track down those who were using the counterfeited technology. Plaintiffs hosted seminars and presentations for the Spanish authorities to educate them about digital television piracy. They filed approximately 70 claims against individuals and entities who were engaged in counterfeiting, including websites, manufacturers, distributors, dealers, accused hackers, and users of the counterfeit cards. In addition, they collaborated with other users of the technology to create a website to share information about hackers and possible countermeasures. Under these alleged facts, Plaintiffs were reasonable and diligent in taking an investigative approach similar to that used by drug enforcement agents.

Because--on the facts as pleaded--Plaintiffs were diligent until they learned Defendants' identities, the period of time before March 12, 2002, is equitably tolled and added to the end of the limitations period. *See Socop-Gonzalez v. INS*, 272 F.3d 1176, 1195-96 (9th Cir. 2001) (*en banc*) (rejecting the tolling rule adopted in *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1179 (9th Cir. 2000), and adopting "the conventional rule that when a statute of limitations is tolled, the days during a tolled period simply are not counted against the limitations period"); *Lantzy v. Centex Homes*, 73 P.3d

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[1] In ruling that Plaintiffs had not been diligent, the district court relied in part on Plaintiffs' actions *after* March 12, 2002. Those actions are irrelevant to determining whether Plaintiffs were reasonable and diligent *before* March 12, 2002, in trying to learn Defendants' identities.

517, 523 (Cal. 2003) (discussing California Supreme Court cases that "illustrate [that] the effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred."). Consequently, Plaintiffs had three years from March 12, 2002, to file their federal claims, and two years from March 12, 2002, to file their state claims. Thus, assuming their allegations to be true, when Plaintiffs filed suit in July 2003, all of their claims were timely.

2. To establish a violation of RICO, 18 U.S.C. § 1962(c), Plaintiffs alleged two associated-in-fact enterprises: a distribution enterprise and a technology enterprise.

On the distribution enterprise allegation, the district court held that Plaintiffs did not allege sufficient control by Defendant NDS Group over the enterprise. To invoke liability under § 1962(c), "*some* part in directing the enterprise's affairs is required," *Reves v. Ernst & Young,* 507 U.S. 170, 179 (1993), but *significant* control is not required, *id.* at 179 n. 4. Instead, "one must [only] participate in the operation or management of the enterprise itself." *Id.* at 185. "[L]iability under § 1962(c) is not limited to upper management," because "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184.

Here, Plaintiffs alleged a distribution enterprise that, at the very least, Defendant NDS Group helped to operate. According to the allegations, NDS Group organized the distribution enterprise to publish the hacked encryption code. The First Amended Complaint and the Second Amended Complaint are not necessarily inconsistent in this regard. It is not incongruous that Defendants would organize and direct the

distribution enterprise and then charge another individual to implement the scheme. And Paragraph 102 of the First Amended Complaint explicitly alleged Defendants' involvement in the distribution enterprise. Even if we assume that statements in the Second Amended Complaint conflicted with statements in the First Amended Complaint, "[w]here ... the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995) (citing *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)).

On the technology enterprise allegation, the district court held that Plaintiffs did not allege facts sufficient to establish a distinct RICO enterprise. "Under RICO, an 'enterprise' is 'a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit.'" *Sever v. Ala. Pulp Corp.*, 978 F.2d 1529, 1533 (9th Cir. 1992) (quoting *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984)). "[A] corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)." *Id.* at 1534.

Here, if we view the pleadings in the light most favorable to Plaintiffs, the enterprise consisted of two separate corporations--one existing under the laws of the United Kingdom and one existing under the laws of the State of Delaware--and individuals who appear to be independent contractors (the Haifa Team) hired to hack the encryption code. Accordingly, if we take the allegations as true, neither corporate Defendant is both the RICO person and the RICO enterprise, so there is a distinct RICO enterprise pleaded.

REVERSED and REMANDED.

APPENDIX B

DISTRICT COURT ORDER GRANTING NDS'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOGECABLE, S.A., CANALSATELITE DIGITAL, S.L.,
Plaintiffs,
v.
NDS GROUP PLC, NDS AMERICAS, INC.,
Defendants.

CASE NO. SACV 03-1174 DOC
(ANx)

ORDER GRANTING MOTION
TO DISMISS SECOND AMENDED COMPLAINT

Before the Court is the motion of Defendants NDS Group PLC and NDS Americas, Inc. ("NDS"), to dismiss the second amended complaint ("SAC"). After reviewing the moving, opposing, and replying papers, after the hearing on July 23, 2004, and for the reasons given below, the Court GRANTS the motion to dismiss.

I. BACKGROUND

Plaintiff, Sogecable, is the leading provider of pay television services in Spam. It offers an analog broadcast pay television channel and a full range of multichannel digital direct-to-home subscription programming options through its subsidiary Canalsatelite Digital ("CSD"). Sogecable is an 83.25% shareholder in CSD, which has over a million subscribers. Sogecable and CSD have invested millions of dollars in an electronic security system to protect CSD pro-

gramming from being obtained by unauthorized users. In particular, Sogecable entered into a license to use a "MediaGuard" system from its owner SECA, which is now Canal+ Technologies. A consumer wishing to subscribe to CSD's programming needs the necessary equipment, including a "Canal+ smart card" which deciphers access messages and provides the deciphering keys needed by the system to descramble the encypted transmission messages.

Defendant, NDS, is a supplier of conditional access software and a competitor of Canal+ Technologies. NDS has allegedly compromised the Canal+ security system and published the Canal+ code. NDS engineers in Israel allegedly disassembled and analyzed the Canal+ smart cards and hacked the code on them to allow unauthorized access. According to the complaint, NDS then transferred the code to its employee in California who subsequently transferred the code to one Al Menard who published the code on his website. This allowed altered smart cards to proliferate providing unauthorized access to Sogecable's satellite broadcasts.

On December 22, 2003, the Court issued an order ("December 22nd Order") granting the Defendants' motion to dismiss the First Amended Complaint ("FAC"). The basis for the Court's ruling was that Plaintiffs had not adequately alleged a RICO enterprise and that all of the Plaintiffs' non-RICO claims were time-barred on the face of the FAC. Regarding the statute of limitations, the Court specifically rejected Plaintiffs' argument that it was not possible through diligence to have discovered the identities of the proper defendants as inconsistent with the other allegations of the FAC. Furthermore, the Court found that California law and Ninth Circuit precedent require some form of fraudulent concealment in order to equitably toll the statute of limitations and Plaintiffs had not adequately pled such fraudulent concealment.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957), *see Balistreri v Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory).

The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993), *Balistreri*, 901 F.2d at 699, *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996), *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

III. ANALYSIS

A. Statute of Limitations

Defendants again argue that Plaintiffs' non-RICO claims are barred by the statute of limitations The statutes of limitations for the asserted Digital Millennium Copyright Act ("DMCA") and Federal Communications Act ("FCA") claims are three years, 17 U.S.C § 507(b), Cal Code Civ Proc § 338(1), and the statutes of limitations for the asserted state

law claims is two years, *Knoell v. Petrovich*, 76 Cal App. 4th 164, 168 (1999)

1. Accrual

Plaintiffs argue that "Sogecable does not know and thus does not allege the date it was first injured by NDS." (Opposition at 12) Plaintiffs proceed to further state that, "Because the court must construe the SAC in the light most favorable to plaintiff, and because factual uncertainty exists as to when 'non-MOSC' counterfeit cards from the fruit of NDS's wrongdoing entered Spain, Sogecable's claims are deemed to have accrued no earlier than January 2001 [when MOSC cards entered Spain]" (*Id.*)

The distinction Plaintiffs are drawing between "non-MOSC" and "MOSC" cards is difficult to understand in this context. Apparently MOSCs are "those pirate cards that could be 'updated' to overcome Sogecable's piracy countermeasures," (*Id.*), while presumably non-MOSCs (sometimes referred to in the SAC as just "smart cards", *see* SAC ¶ 51 making a distinction between "counterfeit smart cards" and MOSCs) cannot be updated. However, the SAC claims damages from both types of cards. The SAC abruptly abandons its distinction between "smart cards" and MOSCs in ¶ 51 and from that point on only refers to "pirate cards" and seeks damages due to the use of both cards. *See, e g* , SAC ¶ 124 ("The widespread use of pirate cards for which defendants are responsible has caused CSD to lose substantial subscription revenues").

A further examination of the SAC further undercuts the "smart card" / MOSC distinction for accrual purposes Paragraph 120 of the SAC states, in its entirety:

> The smart cards are the key to the MediaGuard system and the linchpin in the protection of Sogecable's satellite television broadcasts. Once the smart card technology was compromised and distributed by NDS or at

> its direction and control, pirate cards were made possible and proliferated, causing the theft of Sogecable's satellite television broadcasts – its primary source of revenue Sogecable suffered substantial damages as a result.

(SAC 120) Paragraph 120 shows, in Plaintiffs' own words, that the injury was sustained as early as the "smart card technology was compromised and distributed by NDS."

The SAC further alleges that, "In July 1999, Sogecable first became aware of what it reasonably believed to be isolated incidents of counterfeit smart cards" (SAC 45). At that point, Plaintiffs were, as shown on the face of their complaint, aware that their smart card technology was compromised and was aware that at least a small number of counterfeit smart cards were being sold. The fact that Plaintiffs may have thought that the injury was "isolated" is inconsequential to determining when the injury occurred.[1]

The much more interesting and relevant question — and a question not extensively addressed by either party in the briefs — is whether Plaintiffs' causes of action accrued when Plaintiffs discovered the "hack" of the security system or when Plaintiffs discovered the first "pirate cards" sold in Spain.

The basic statement of accrual law is that "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Tworivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). The question is what constitutes the "injury" in this case.

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[1] Plaintiffs attempted to clarify the MOSC/ non-MOSC distinction at oral argument. Apparently, production of non-MOSC cards does not require that the security system's UserROM to be compromised. However, as discussed in depth below, the FAC specifically stated that cards available in 1999 "contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack [referred to in the SAC as the "Canal+ Hack"]" (FAC ¶ 45).

For the DMCA and FCC claims, the Court finds that the action accrues at the time Plaintiff was aware or should have been aware that the security system was "hacked." In determining the proper time for accrual of a claim it is important to examine the actual requirements of the claim Plaintiffs assert that Defendants have violated 17 U.S.C. §§ 1201(a)(2) and 1201(b). These sections are substantially similar and state in relevant part.

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —
>
> (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or portion thereof,
>
> (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof, or
>
> (C)

17 U.S.C. § 1201(b). 47 U.S.C. § 605(e)(4) similarly states that

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services [is in violation of this section]

Id.

These are simply not statutes with complicated accrual problems The "injury" under these statutes is the distribution of the "device" that is designed to circumvent copyright protection or allow unauthorized decryption of satellite broadcasting. While the harm from mere distribution of circumvention technology may be abstract, this comes from the fact that Congress has chosen to create liability for a practice that can sometimes result in an abstract harm. The statutes do not require that anyone actually circumvent copyright protection – only that a device designed to circumvent copyright protection was distributed. Furthermore, it is clear to this Court that Plaintiffs could have brought suit against Defendants under the DMCA and FCC for injunctive relief once they knew that the system had been cracked and critical copyright protection information was being distributed.

Although the alleged fact was left out of the SAC, Plaintiffs specifically pled in the FAC that

> As noted above, in 1999, counterfeit MediaGuard smart cards began emerging on markets worldwide. These cards, produced only after publication of the MediaGuard UserROM, contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack [referred to in the SAC as the "Canal+ Hack"] and caused to be published on the DR7 website.

(FAC 45) To the degree that the SAC implies that the "smart cards" distributed in 1999 may not have contained the entire MediaGuard UserROM, it is disregarded as inconsistent with Plaintiffs' prior pleadings *Reddy v. Litton Indus Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading.")

The SAC clearly connects the MediaGuard UserROM to the complained of SECAROM ZIP allegedly distributed by the Defendants

> NDS used the results of this work to download the UserROM software from the Canal+ MediaGuard smart card. The UserROM is the portion of the memory of a smart card that is necessary to control access to the digital data stream. The Haifa team created a digital archive file named "SECAROM ZIP," containing a copy of the MediaGuard UserROM

(SAC ¶ 81) The distribution of "SECAROM ZIP" is the basis of Plaintiffs' DMCA and FCC claims (*See*, e.g., SAC ¶¶ 134, 135, 144, 145). Even more clearly, Plaintiffs allege that

> On March 26, 1999, Menard at DR7 published Canal+'s UserROM code on the DR7 website. For a few months after its posting, the Canal+ MediaGuard UserROM code could be downloaded for free by hackers and counterfeiters, enabling them to produce, distribute, and sell pirate cards. This was precisely NDS's intent

(SAC ¶ 84)

Given all of these statements in Plaintiffs' complaints, their claims under the DMCA and FCC accrued at least by the time that they noted the counterfeit MediaGuard smart cards began to emerge that "contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack and caused to be published on the DR7 website" (FAC ¶ 45) At this point, 1999, Plaintiffs knew, or reasonably should have known, that someone had distributed the MediaGuard UserROM (a/k/a SECAROM ZIP).

The Court need not reach the perhaps more complicated issue of accrual of the state interference torts because pirate cards were being sold in Spain by at least July 2000 and the state interference torts only have two year statutes of limitations.

2. Inability to Discover
Alleged Wrongdoers through Diligence

Plaintiffs once again argue that they were unable to possibly discover the identity of the alleged wrongdoers through reasonable diligence. The Court rejected this argument in the December 22nd Order that dismissed the FAC, noting that the FAC explicitly stated that Plaintiffs had relied on Canal+ to investigate the identities of the hackers of the security system.

In the SAC, Plaintiffs add statements that explain this reliance in terms of the normal reliance that one might place on a consultant. (*See* SAC ¶ 162) Since the SAC clearly alleges that Plaintiffs do not have expertise in the security business, (*Id.*), this type of reliance is not entirely unreasonable.

However, nothing in the SAC alters the uncontroverted fact that Canal+ filed suit on March 11, 2002 against Defendants for the same conduct alleged in this action. *Group Canal+ S.A., et al. v. NDS Group PLC., et al*, Case No 02-CV-01178 (N.D. Cal.) (hereinafter "Canal+ Action") (*See* Plaintiffs' Judicial Notice Ex. B) Obviously Canal+ was, in fact, able to acquire enough information by some point prior to March 11, 2002, to allow it to allege that Defendants engaged in the conduct of which Plaintiffs complain. If Plaintiffs relied upon Canal+ expertise to investigate Plaintiffs' claims as is strongly implied in SAC ¶ 62, then reasonable diligence means that Plaintiffs should have taken steps to ensure that Canal+ would "keep them in the loop" on the outcome of that investigation. The Court sees no reason to prejudice Defendants for the alleged lack of communication between Plaintiffs and Canal+.

Furthermore, there is no reasonable explanation for the lapse of time between the Canal+ filing date of March 11, 2002, and the date Plaintiffs filed their motion for intervention in the Canal+ Action, December 19, 2002. Plaintiffs

explicitly admitted in their FAC that "Sogecable and CSD reasonably relied on Canal+ to safeguard their interests and claims against NDS in the Northern District action." (FAC 16). Furthermore, Plaintiffs admitted in the FAC that they did not move to intervene in the Canal+ Action until it became clear that Canal+ was moving to settle its claims with Defendants, apparently in a way that was unsatisfactory to Plaintiffs (*See* FAC 1117). The Court is not pointing out the lapse in time between the filing of the Canal+ Action in reversion to the rule of *Santa Maria v. Pac Bell*, 202 F.3d 1170 (9th Cir. 2000) that a plaintiff who is otherwise entitled to equitable tolling cannot use the doctrine when it was able to file its suit within the normal statute of limitations — a rule that was repudiated in *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc). Rather, this lapse is mentioned as further evidence that Plaintiffs are *not entitled to tolling* for any part of the claimed period because Plaintiffs, according to their own pleadings, have sat back on their rights and allowed another party to "safeguard their interests and claims against NDS."

Plaintiffs only arguments for tolling contradict the express admissions that they have made In light of this, the Court finds that there is no set of facts that Plaintiffs can prove that would warrant equitable tolling. Plaintiffs state that they could not have discovered the identity of the Defendants within the required period, but the very entity that Plaintiffs were using to investigate their claims undeniably discovered the identity of the Defendants at a much earlier date than the filing of this action. It is also undeniable from the explicit admissions by Plaintiffs in their complaints that Plaintiffs not only relied upon another party to investigate their claims —which might have been reasonable under the circumstances — but also relied on another party to pursue those claims in court. This is not at all consistent with the reasonable diligence required for equitable tolling of the statute of limitations.

Furthermore, there is nothing in any of Plaintiffs' complaints that would indicate that this is an usual or extraordinary case. Plaintiffs basically describe conduct that is both illegal and inherently difficult to discover. Congress chose to set the statute of limitations on this conduct at three years, and presumably Congress took the "shadowy" nature of computer hackers into account in making that determination. There is nothing alleged in the SAC, or in the first two complaints, that would indicate any limit to the equitable tolling argument advanced by the Plaintiffs, and the same arguments could be advanced by virtually any DMCA or FCC plaintiff.[2]

3. Intentional Concealment by Defendants

Plaintiffs once again argue that Defendants should be equitably estopped from succeeding on their statute of limitations defense because Defendants intentionally concealed their role in the alleged acts that injured Plaintiffs. However, this contention is directly contradicted by Plaintiffs' FAC that expressly stated that "The code [SECAROM ZIP] was viewed as 'legitimate' within the hacker community because it was known to have been from an NDS operative." (FAC ¶ 45) As noted earlier, pleadings that are inconsistent with Plaintiffs' prior pleadings should be disregarded *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading.")

Plaintiffs attempt to explain away the statement that the code was "known to have been from an NDS operative" (and

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[2] Plaintiffs might argue that the unexpected involvement of a legitimate company makes this an usual case, but one of the keys to Plaintiffs' tolling argument is that they could not pinpoint Menard and DR7 as the source of the UserROM. Menard is clearly identified in the SAC as a "known satellite television signal pirate and hacker." (SAC ¶ 83) The alleged difficulty in discovering Menard's involvement would indicate that a similar tolling argument could be made against Menard or any other ordinary hacker.

its notable absence from the SAC) is utterly unconvincing. First, Plaintiffs argue that the statement came from Canal+'s complaint Plaintiffs provide no citations to either the complaint or first amended complaint in the Canal+ Action, and, indeed, this statement is not in either (*See* Defendant's Third Request for Judicial Notice, Ex. A & B) To clarify the significance of this Plaintiffs have made a representation to this Court that appears to be completely and verifiably false.

Plaintiffs further argue that the statement was removed from the SAC because it was "ambiguous and misleading." (Opposition at 8) The entire text of paragraph 45 of the FAC is as follows with the relevant portion bolded.

> As noted above, in late 1999, counterfeit MediaGuard smart cards began emerging on markets worldwide. These cards, produced only after publication of the MediaGuard UserROM, contained a perfect replica of the complex encryption table NDS extracted through the Haifa hack and caused to be published on the DR7 website. The code was viewed as legitimate within the hacker community because **it was known to have been from an NDS** operative. Without that information the counterfeit cards would not have been able to carry out their purpose – to trick the MediaGuard system in [sic] believing the user of the counterfeit or altered smart card was authorized to have access to certain programming protected by the system without payment for that access.

(FAC ¶ 45) (emphasis added) Plaintiffs claim that the bolded language was "ambiguous and misleading" because it "suggested that Sogecable knew in 1999" that NDS was involved.

The Court rejects the argument that the language is in any way ambiguous or misleading. It says, "The code was viewed as legitimate within the hacker community because it was known to have been from an NDS operative." The

Court was *not* under the impression that paragraph 45 was saying that Sogecable was aware of NDS's involvement in 1999 Plaintiffs alleged in that paragraph that at least the *hacker community* knew that the MediaGuard UserROM being distributed on the DR7 website was from NDS. Plaintiffs claim that "what a hacker in 1999 knew about the source of the DR7 posting matters not." (Opposition at 8) But what hackers knew in 1999 does matter . Plaintiffs are arguing that NDS concealed its role in the alleged acts. If the "hacker community" was aware that NDS was involved, NDS was apparently not concealing its identity. A potential defendant is not required to walk up to a potential plaintiff and strike him on the face with a white glove to ensure that the plaintiff is aware that he has been wronged. Defendants are not required to call Plaintiffs on the telephone and say, "Hey, we hacked your system," in order for equitable estoppel to not apply. Paragraph 45 of the FAC is not even a statement that one or two people knew, but rather that a "community" was aware of NDS's involvement which is inconsistent with an allegation that NDS was concealing its role in the activities.[3]

In short, the allegations in the SAC "were changed in material ways that were not adequately explained." *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1325 (Fed Cir. 1998) (interpreting Ninth Circuit law). Before the unexplained changes, the FAC, on its face, alleged facts that completely undermined a finding of equitable estoppel. As the Ninth Circuit

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[3] In response to this section in the tentative order issued by the Court, Plaintiffs argued that knowledge in the "hacker community" cannot be imputed to the Plaintiffs. Once again, the Court is not under the impression that Plaintiffs necessarily knew in 1999 that NDS was involved in the placement of the code, nor is it imputing such knowledge to Plaintiffs. This portion of the FAC is relevant because it severely undercuts Plaintiffs' argument that NDS concealed its involvement. In equitable estoppel and fraudulent concealment, the point is not what Plaintiffs knew, the point is what actions NDS took to conceal.

has aptly noted, "Whether the case can be dismissed depends on what the pleadings say. A plaintiff may plead herself out of court. If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Weisbach v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997). This rule requiring a plaintiff to maintain some consistency between earlier and later pleadings is not at all unfair considering the fact that a court must take the facts alleged in the pleadings as true when ruling upon a Rule 12(b)(6) motion. Otherwise a plaintiff could have it "both ways" – pleading in great detail on "information and belief' to avoid dismissal, especially in fraud cases, and then disavowing the pleadings when they turn out to be inconvenient.

An independent reason to reject Plaintiffs' equitable estoppel argument is because they have not alleged any reliance on any fraudulent statements or actions by the Defendants." A plaintiff's reasonable reliance on fraudulent concealment is required for application for equitable estoppel." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1173 (9th Cir. 2002). Furthermore, a plaintiff "must plead with particularity the facts which give rise to the claim of fraudulent concealment." *Guerrero v. Gates*, 357 F.3d 911, 919 (9th Cir. 2004).

Plaintiffs argue that reliance is not required for a finding of equitable estoppel through fraudulent concealment. While some cases do refer to reliance as one of a list of "non-exhaustive" factors, *see Santa Maria*, 202 F.3d at 1176, *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002), clear precedent also points out that reliance is a necessary requirement for equitable estoppel, *Santa Maria*, 202 F.3d at 1177 ("if a misrepresentation is to equitably estop PacBell from asserting the statute of limitations, Santa Maria must show that his reliance on it was reasonable"), *id.* at 1173.

("We hold that a plaintiffs reasonable reliance on fraudulent concealment is required for application of the doctrine of equitable estoppel"), *Guerrero*, 357 F.3d at 919 ("The plaintiff must demonstrate that he relied on the defendant's misconduct in failing to file in a timely manner.").

Plaintiffs' attempt to invoke the securities fraud concept of "presumed reliance," *see Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is wholly inapposite. "Presumed reliance," as used in securities law for publicly traded stocks is an extension of the belief that public securities markets in the United States are efficient and any false information provided by a company will be incorporated into investor decisions through that efficient market. This case has nothing to do with an efficient market or the efficient market hypothesis.

4. Motion to Intervene in Canal+ Action

Plaintiffs state that their motion to intervene in the Canal+ Action should toll the statute of limitations for the period of "December 2002 through July 25, 2003." The Court finds that there is little clear precedent on whether a motion to intervene in one action tolls the statute of limitations in a separate action. However, the Court need not decide this issue because Plaintiffs' claims are time barred regardless of whether the motion to intervene tolled time in this case.

As an initial matter, there appears to be no support for the argument that the tolling period would extend to July 25, 2003 — the filing date of this action. Plaintiffs filed their motion to intervene on December 19, 2002, and the Canal+ Action was terminated with no ruling on the motion to intervene on May 14, 2003. At most, the motion to intervene results in a tolling between those dates — slightly less than five months. Taking the allegations of the complaint in the light most favorable to the Plaintiffs, Plaintiffs' DMCA and

FCC claims accrued on December 31, 1999,[4] and the statute of limitations would have run, without tolling, on December 31, 2002. A slightly less than five month tolling due to the intervention motion leads to a critical date near the end of May 2003. This action was filed on July 25, 2003.

Similarly, even assuming that the state interference claims accrued on July 31, 2000, the two year statutes of limitations would have run, without tolling, on July 31, 2002. A five month tolling only makes the critical date for those claims in late December 2002, well before July 25, 2003.[5]

5. Judicial Estoppel

Judicial estoppel does not provide a bar to Defendants asserting their statute of limitations and res judicata defenses. The purpose of the doctrine of judicial estoppel is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808 (2001) (internal quotations omitted). The Supreme Court has outlined three general factors that are looked to when a court examines judicial estoppel question, but has also noted that judicial estoppel is "an equitable doctrine invoked by a court at its discretion." *Id.* at 750.

The three factors pointed out by the Supreme Court were:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in

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[4] The accrual date is December 31, 1999, because Plaintiffs only state that they discovered the pirated cards in "1999"

[5] In fact, the statutes of limitations on the state claims had even run at the time of the intervention motion.

> a later proceeding would create the perception that either the first or second court was misled. [And third,] whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (internal quotations and citations omitted).

The Court has before it all of the information necessary to make a determination on judicial estoppel in this case. The Court has the entire transcript of the April 3, 2002 heating at which Defendants are alleged to have made a representation to Judge Vaughn Walker presiding over the Canal+ Action that "the putative interveners would suffer no prejudice from the dismissal" (Opposition at 20) The parties also agree that Judge Walker dismissed the Canal+ Action without making any ruling on the motions for intervention, thereby mooting the issue.

After reviewing the April 3, 2002 hearing transcript, it is clear to the Court that Defendants did not take a position "clearly inconsistent" with an assertion of a statute of limitations defense. The statement by Defendants' counsel which allegedly should invoke judicial estoppel is

> Well, once the Canal+ claim is dismissed with prejudice, there's nothing that can happen in this action that would be harmful or impair or impede in anyway [sic] the claims that Echostar or any of the other parties wished to make

(Sogecable Request for Judicial Notice Ex. A (April 3, 2002 Hearing Tr.) at 9:11-14)

A review of the statements by Defendants' counsel immediately before the quoted passage makes the context of counsel's statements clear

> The litigation that originally came to your honor, is going to be disposed of on the merits by an arm's-length negotiated settlement, and I submit to your honor that in that light, in that context, Rule 24 clearly does not permit intervention, because under Rule 24(a) if intervention is to be allowed, there must be, not only an interest in the subject matter of the action but an interest that stands to be impaired or prejudiced by the prosecution of the action in the absence of the would-be intervener
>
> Well, once the Canal+ claim is dismissed with prejudice, there's nothing that can happen in this action that would be harmful or impair or impede in anyway [sic] the claims that Echostar or any of the other parties wished to make

(*Id.* at 9:2-14)

This was a statement about prejudice in the Canal+ Action, not in any other action the proposed interveners might file. "[T]here's nothing that can happen in *this action* that would be harmful." (*Id.*) The argument was that there would be no prejudice in the Canal+ Action because the Canal+ Action would be terminated if not for the proposed intervention.[6] A further reading of the entire transcript of the April 3, 2002 hearing confirms that in the entire discussion by all counsel present, as well as Judge Walker, the statute of limi-

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[6] At oral argument, Plaintiffs tried to minimize this reasoning by noting that "of course" there would be no prejudice stemming from the Canal+ Action if that case were dismissed — with the implication that Defendants must have been talking about some other sort of prejudice. But the lack of prejudice from a settled Canal+ Action was exactly what the Defendants were talking about The Defendants' point was simply that a motion to intervene into a settled case makes no sense. (Remember that the motions to Intervene were not filed until the Canal+ Action had basically been settled)

tations (or any other bar) is not mentioned even one time by anyone.

As the Court finds that Defendants' prior statements in the April 3, 2002 hearing are not in any way inconsistent with an assertion of the statute of limitations in this separate action and the Court finds that a change of positions is the critical threshold requirement for application of judicial estoppel, Plaintiffs' request that Defendants be judicially estopped is denied.

B. RICO

1. RICO Enterprise

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must plead the existence of an "enterprise" that is engaged in a pattern of racketeering activity or collection of unlawful debt. The RICO statute defines "enterprise" to mean (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C § 1961(4)

In this case, Plaintiffs RICO claim is primarily based on an enterprise of the second variety. The Supreme Court has held that an associated in fact enterpnse under RICO must (1) have an ongoing formal or informal organization and (2) function as a continuing unit *See United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528 (1981). The law of the Ninth Circuit further requires that the "organization, formal or informal, be an entity separate and apart from the pattern of racketeering activity in which it engages." *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996).

In the First Amended Complaint, Plaintiffs alleged the existence of a "technology structure" and a "distribution structure" that were alleged to both be part of a single RICO enterprise. The RICO allegations of the FAC were dismissed because the FAC did not effectively connect the two

"structures" into a single cohesive enterprise controlled through a single hierarchy. The Second Amended Complaint now alleges that the technology and distribution structures are separate RICO enterprises although they worked together to accomplish the acts that form the basis of the complaint.

a. Distribution Enterprise

The Court finds that the allegations that Defendants were part of and, in fact, controlled a Distribution Enterprise as described in the SAC fail because these allegations directly contradict statements previously made in Plaintiffs' FAC

The SAC states that

> Plaintiffs are informed and believe that NDS Group itself exercised control over [the distribution] enterprise and made all decisions for it, although Tarnovsky served as the common member and "bridge" between the two enterprises, and Tarnovsky may have exercised some degree of discretion in directing and controlling the distribution enterprise under potentially broad mandates or instructions from NDS Group

(SAC ¶ 166)

This directly contradicts the following statements from the FAC

> Participant Al Menart [sic Menard] is or was at the top of the distribution and sale structure of the enterpnse and controls this enterpnse through various business entities

(FAC ¶ 94)

> Participant Al Menart [sic] exerted control over the direction of the enterprise by, for example, selling devices that allowed the pirates to operate as "dealers" of altered Access Cards

(FAC ¶ 95)

Compare these statements to

> NDS is or was the primary decision maker of the technology structure of the enterprise, controlling and directing the affairs of Christopher Tarnovsky on an ongoing basis and recruiting or attempting to recruit others for the enterprise. NDS exerted control over the direction of the enterprise by, for example, employing or attempting to employ individuals to hack or break the MediaGuard system, and by determining what technology and information would be made available to harm the owners and users of the MediaGuard system, including Sogecable and CSD.

(FAC ¶ 96) Notably, NDS (NDS Group or NDS Americas) is not alleged in the FAC to have been a part of the "distribution structure."

As regrettably stated several times before in this Order, the SAC will be disregarded to the extent that it is inconsistent with Plaintiffs' prior pleadings. *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) ("the amended complaint may only allege other facts consistent with the challenged pleading") Plaintiffs, in their opposition, attempt to reconcile the obviously inconsistent statements in their pleadings by arguing that the SAC makes clear that NDS "directed Menard's posting of MediaGuard in a particular place and in a manner that would obfuscate its source, while ensuring that satellite pirates obtained it and used it." (Opposition at 24) Besides the obvious fact that this statement contradicts the statement in the FAC that "The code was viewed as legitimate within the hacker community because it was known to have been from an NDS operative," (FAC ¶ 45), the Defendants correctly point out that the relationship cited in the Opposition brief is simply not in the SAC. The paragraphs of the SAC cited (SAC ¶¶ 82-83, 92, 107) state that NDS instructed *Tarnovsky* to post the offending code on the Internet (*See* SAC ¶ 82), and only that "Tarnovsky or an-

other employee from NDS Americas transmitted the code from California to Al Menard." (SAC ¶ 83) There is no allegation in the SAC that NDS in any way exerted any control over the way in which Menard chose to distribute the code. At best, the SAC alleges a supplier/distributor relationship between NDS and Menard which is insufficient to show control for RICO enterprise purposes.

Since the alleged connection between NDS Group and the Distribution Enterprise is that "NDS Group itself exercised control of this enterprise and made all decisions for it," and this alleged connection is inconsistent with the allegations of the FAC, the SAC does not adequately plead that NDS Group is part of any RICO "Distribution Enterprise."

b. Technology Enterprise

The allegations in the SAC that Defendant, NDS Group, is a part of a separate RICO Technology Enterprise are consistent with the FAC The question then is whether this Technology Enterprise is sufficiently plead as a RICO enterprise.

Defendants point out that the Technology Enterprise, as alleged, only includes NDS Group, its subsidiary NDS Americas, and its employees Defendants then argue that a RICO enterprise must be an entity distinct from the actual RICO defendant *See Rae v. Union Bank*, 725 F.2d 478 (9th Cir. 1984).

Rae states that a RICO enterprise is "a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit." *Id.* at 481 Therefore, "a corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992). As the *Sever* court pointed out, this "poses a problem only when the corporation is the named defendant — when it is both the 'person' and the 'enterprise'" *Id.* (contrasting the situation

where the plaintiff "named the several individual officers as defendants/persons and [the corporation] as the enterprise.")

In this case, the only defendant named under the RICO count of the complaint is NDS Group However, the "Technology Enterprise" is allegedly made up of NDS Group, the "Haifa Team", and NDS Americas. (SAC ¶ 165) The "Haifa Team" was composed of NDS employees (*See* SAC ¶¶ 8, 75, 76). NDS Americas is a subsidiary of NDS Group. (SAC ¶¶ 8, 15). Thus, the "Technology Enterprise" appears to be nothing more than a subset of NDS Group. Even if some of the "hackers" were only nebulous "agents" of NDS Group and not technically employees, the important fact remains that the only structure that the Technology Enterprise is alleged to have is that of NDS Group itself. This is exactly the type of RICO claim prohibited by *Rae* — the situation where the Defendant is both the RICO person and the RICO enterprise It is clear from the SAC that the "Technology Enterprise" structure is NDS Group or a piece of NDS Group and the defendant/person is also NDS Group. Therefore, the RICO enterprise allegation with respect to the Technology Enterprise also fails.

2. Pattern of Racketeering Activity

Since the Plaintiffs have not properly pled a RICO enterprise, the Court does not reach the question of whether they have properly pled a pattern of racketeering activity.

C. Res Judicata

Since all of the claims have been dismissed on other grounds, the Court does not reach the Defendants' res judicata arguments.

IV. DISPOSITION

For the reasons given above, Defendants' motion is GRANTED and the second amended complaint is DIS-

MISSED. Plaintiffs' may amend their complaint within 30 days of this order.

IT IS SO ORDERED

DATED AUGUST 3, 2004

/s/ David O. Carter

DAVID O. CARTER
United States District Judge

APPENDIX C

ORDER OF THE DISTRICT COURT GRANTING NDS'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOGECABLE, S.A.,
CANALSATELITE DIGITAL, S.L.,

Plaintiff(s),

v.

NDS GROUP PLC, NDS AMERICAS, INC.,

Defendant(s).

CASE NO. SACV 03-1174 DOC (ANx)

ORDER GRANTING MOTION TO DISMISS

Before the Court is the motion of Defendants NDS Group PLC and NDS Americas, Inc. ("NDS"), to dismiss the first amended complaint ("FAC"). After reviewing the moving, opposing, and replying papers, after the hearing on December 22, 2003, and for the reasons given below, the Court GRANTS the motion to dismiss.

I. BACKGROUND

Plaintiff, Sogecable, is the leading provider of pay television services in Spain. It offers an analog broadcast pay television channel and a full range of multichannel digital direct-to-home subscription programming options through its subsidiary Canalsatelite Digital ("CSD"). Sogecable is an

83.25% shareholder in CSD, which has over a million subscribers.

Sogecable and CSD have invested millions of dollars in an electric security system to protect CSD programming from being obtained by unauthorized users. In particular, Sogecable entered into a license to use a "MediaGuard" system from its owner SECA, which is now Canal+ Technologies. A consumer wishing to subscribe to CSD's programming needs the necessary equipment, including a "Canal+ smart card" which deciphers access messages and provides the deciphering keys needed by the system to descramble the encrypted transmission messages.

Defendant, NDS, is a supplier of conditional access software and a competitor of Canal+ Technologies. NDS has allegedly compromised the Canal+ security system and published the Canal+ code. NDS engineers in Israel allegedly disassembled and analyzed the Canal+ smart cards and hacked the code on them to allow unauthorized access. According to the complaint, NDS then transfered the code to its employee in California who subsequently transferred the code to one Al Menart who published the code on his website. This allowed altered smart cards to proliferate providing unauthorized access to Sogecable's satellite broadcasts.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint can be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957); *see Balistreri v. Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cogni-

zable legal theory" or sufficient facts to support a cognizable legal theory).

The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *Balistreri*, 901 F.2d at 699; *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

III. ANALYSIS

A. Statute of Limitations

Plaintiffs' Digital Millennium Copyright Act ("DMCA") claims under 17 U.S.C. § 1201 are barred by the statute of limitations. The most precise statement of Plaintiffs' DMCA allegations is found in paragraph 65 of the FAC:

> Defendants' importation of a computer file to California that contained the hacked code to the encryption technology, NDS Americas' receipt of the file here, and the distribution of that code to be posted on the DR7 website were acts material to and a direct cause of Sogecable's and CSD's losses.

FAC ¶ 65.

According to the FAC, all of these actions took place by the time Al Menart allegedly published the code on his website on March 16, 1999. See FAC ¶ 44. There appears to be no allegation that Defendants engaged in any actions in violation of section 1201 since late 1999. The current action

was filed July 25, 2003, and the DMCA has a three year statute of limitations. Even if the statute of limitations was tolled during the five month period pending intervention in the Canal+ case, the claims are still barred by at least a few months.

Plaintiffs try to save their DMCA claims by arguing that Defendants' actions constitute a continuing pattern of contributory infringement. Without deciding whether contributory infringement applies to section 1201 claims, this argument fails for at least two separate reasons: (1) Plaintiffs have simply not pled contributory infringement and (2) the last acts actually taken by Defendants took place in 1999.

From the immediate face of the FAC, the state law claims would also appear to be barred by the statute of limitations which is two years for both claims. As stated before, the last alleged conduct on the part of Defendants took place in March 1999, Plaintiffs discovered the harm in "late 1999," and the complaint was not filed until October 2003.

Plaintiffs' attempt to salvage their claims by arguing for the application of equitable tolling of the statute of limitations. They claim that a tolling of the statute of limitations is proper because Defendants took steps to intentionally conceal their identity making it impossible to discover the party that caused the harm. "Sogecable had no way of knowing that NDS...[was] secretly working to undermine its conditional access system..." Opposition at 19. Not only do the FAC and the Opposition not carry the burden of showing the application of equitable tolling, but the FAC on its face contradicts the assertions that Plaintiffs advance in favor of tolling.

Equitable tolling in this context requires intentional concealment. *Bernson v. Browning-Ferris Indus. of Calif*, 30 Cal.Rptr.2d 440, 446 (Cal. 1994). The only allegation that Plaintiffs point to in order to show intentional concealment is that they used Al Menart's website to disseminate the code

anonymously. Opposition at 17-18. However, the FAC directly contradicts the assertion that the code on the website was from an unknown source. "The code was viewed as 'legitimate' within the hacker community because it was known to have been from an NDS operative." FAC ¶ 45. Plaintiffs never plead any other facts in the complaint nor make any other arguments in their opposition that, if true, would establish intentional concealment by Defendants.

Plaintiffs argue that there is a set of wrongs that are "self-concealing" and for those wrongs it is unnecessary to show specific intentional concealment on the part of a particular defendant. The cases that Plaintiffs cite for this proposition are inapposite. The language quoted from *Hobson v. Wilson*, 737 F.2d 1, 34 (D.C. Cir. 1984), concerns an inability to know that the actual wrong was committed, not the identity of the wrongdoer.

> [W]e conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, in the course of committing the wrong, that is designed to mask the existence of a cause of *action*. The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal *not only their involvement, but the very conduct itself*.

Id. at 34-35 (emphasis added). There is no question that Plaintiffs were aware of the conduct – the compromise of the security system – by late 1999. They were only unaware of the ultimate wrongdoer and perhaps details of how the compromise was carried out by that wrongdoer. Plaintiffs' citation to *Bernson* does nothing to describe the conduct that in this case would constitute intentional concealment and certainly does not reach the conclusion that Plaintiffs seek here. Furthermore, the Ninth Circuit has rejected the idea that fraudulent concealment can be found without active steps on

the part of the defendant. "Fraudulent concealment necessarily requires active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000).

In addition, facts alleged in the FAC itself contradict Plaintiffs' arguments that it was not possible through diligence to discover the identity of NDS as the alleged wrongdoer. Besides the already referred to allegation that the code was known to have come from an NDS operative, the FAC also makes extensive reference to a prior lawsuit involving almost identical facts pursued by Plaintiffs' licensor, Canal+, *Group Canal+ S.A. et al. v. NDS Group PLC et al.*, Case No. 02-CV-01178 (N.D. Cal. filed March 11, 2002). It is through this lawsuit, and the Canal+ investigation that led to it, that Plaintiffs were first informed of NDS's involvement in the alleged wrongdoing. FAC ¶ 25.

Canal+ was obviously able to discover the identity of NDS. In fact, the FAC states that Plaintiffs relied on Canal+ to investigate the identity of the person or group that compromised the security system which led to the claims Plaintiffs raise here. FAC ¶ 23. At oral argument, Sogecable attempted to differentiate their situation by pointing out that they are not a manufacturer of the technology, they are just a user. However, Sogecable knew in late 1999 that the counterfeit access cards were in circulation and appear from the facts alleged in the complaint to have relied on another party to investigate those facts. This is not consistent with the reasonable diligence required to toll the statute of limitations.

In this case, Plaintiffs have sat back and relied on another to investigate and pursue their claims and yet now argue that their claims are barred by neither the statute of limitations or res judicata. The Court declines to accept this position. It is up to the harmed party to pursue his own claim. If Plaintiffs chose to delegate this responsibility to Canal+, they took the

risk that Canal+ might not effectively prosecute Plaintiffs' claims or even keep Plaintiffs informed. Any failings on the part of Canal+ in investigating and prosecuting Plaintiffs' claims are not grounds for tolling of the statute of limitations.

B. Civil RICO

The alleged facts on which Plaintiffs' Civil RICO claims are based are similar to those in related case, *Echostar Satellite Corp. et al. v. NDS Group PLC et al.*, Case No. SACV 03-950 DOC (ANx). Therefore, the Court will repeat some of its reasoning and conclusions from the order with regard to the motion to dismiss filed in that case.

To state a claim under 18 U.S.C. § 1962(c), a plaintiff must plead the existence of an "enterprise" that is engaged in a pattern of racketeering activity or collection of unlawful debt. The RICO statute defines "enterprise" to mean (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

In this case, Plaintiffs RICO claim is based on an enterprise of the second variety. The Supreme Court has held that an associated in fact enterprise under RICO must (1) have an ongoing formal or informal organization and (2) function as a continuing unit. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528 (1981). The law of the Ninth Circuit further requires that the "organization, formal or informal,...be an entity separate and apart from the pattern of racketeering activity in which it engages." *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996).

In its FAC, Plaintiffs allege two separate structures: (1) a "distribution and sales" structure headed by one Al Menart, who is not named as a defendant in this action and (2) a "technology" structure essentially comprised of NDS and its

direct employees and agents. To determine whether the allegations meet the RICO enterprise requirement, the critical question for the Court is whether Plaintiffs have sufficiently alleged a higher criminal structure the controls both the distribution and technology sub-structures. They have not.

The specific allegations of the FAC must be examined to determine whether a sufficient enterprise has been alleged. The only attempt Plaintiffs make to connect the two structures – the distribution and technology structures – is this remarkably conclusory statement:

> On information and belief, the association of Defendants, Participants and/or their agents has an organizational strucutre or system of authority for making an implementing decisions and for exercising common control over its members.

FAC ¶ 93.

Plaintiffs try to assert that the FAC alleges that "NDS organized, supervised, and directed these various individuals, corporations, and business entities into two separate groups within the RICO scheme – a technology structure and a distribution/sales structure." Opposition at 11, ln. 18-21. An examination of the cited paragraphs of the FAC show that they allege no such control by NDS. There are absolutely no alleged facts that, if true, would show an overarching control structure over both the technology structure and the distribution structure.

While citing no caselaw, Plaintiffs claim that "NDS's participation alone is sufficient to establish an ascertainable structure separate from the pattern of racketeering activity." Opposition at 11, ln. 16-18. As discussed at length in the order in the related case, this is not the law. The Ninth Circuit recently found that allegedly organized racketeering activity involving a corporate participant did not meet the sepa-

rate structure requirement. *See Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1111-12 (9th Cir. 2003). Therefore, the mere inclusion of an alleged corporate associate is not enough to show a criminal enterprise.

Plaintiffs have failed to adequately allege a criminal enterprise as defined by 18 U.S.C. § 1961 and by Ninth Circuit precedent and therefore fail to allege the essential elements of their 18 U.S.C. § 1962(c) civil RICO claim.

IV. DISPOSITION

For the reasons given above, the Court GRANTS the motion to dismiss. If the complaint can be amended to state a valid, non-barred claim, the amendment must be made within 30 days of this order.

IT IS SO ORDERED.

DATED: DECEMBER 22, 2003

/s/ David O. Carter

DAVID O. CARTER
United States District Judge

APPENDIX D

ORDER OF THE COURT OF APPEALS DENYING REHEARING AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOGECABLE, SA; CANALSATELITE DIGITAL, S.L.,

Plaintiffs-Appellants,

v.

NDS GROUP PLC; NDS AMERICAS, INC.,

Defendants-Appellees.

No. 04-56990

D.C. No. CV-03-01174-DOC, Central District of California, Santa Ana

ORDER

Before: B. FLETCHER, FERNANDEZ, and GRABER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges B. Fletcher and Fernandez have so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

FILED Feb 21, 2007.
Cathy A. Catterson, Clerk, U.S. Court of Appeals